82-92

Office - Supreme Court, U.S.
FILED
JUL 19 1982
ALEXANDER L. STEVAS,
CLERK

Pet. No. _____

SUPREME COURT OF THE UNITED STATES

October Term 1982

JAMES M. PICCOLO, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Benjamin B. Brown
11300 Rockville Pike
Suite Twelve North
Rockville, Maryland 20852
(301) 770-3020
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether in an affidavit for a search warrant, the omission of material facts regarding an informant's liability plus the inclusion of statements directly contrary to those facts, such that the affidavit viewed as a whole was misleading and false, constitutes intentional or reckless falsity within the test of Franks v. Delaware, where the affiant includes no statements that would enable the Magistrate to resolve this contradictory information.

2. Whether, under Franks v. Delaware, a court may re-examine an excised affidavit and draw inferences of an informant's reliability from the remainder, where the true facts known and omitted by the affiant directly contradict those inferences.

3. Whether a defendant, under Franks v. Delaware, must make a "substantial initial

showing" where the officer-affiant admits at trial that he both failed to include material facts regarding his informant's reliability in the affidavit, and included statements directly contrary to those omitted facts.

LISTING OF PARTIES

The Petitioner is James M. Piccolo of 934 7th Street, N.W., Washington, D.C. 20004.

The Respondent is the United States Government acting through the United States Attorney in the District of Columbia.

TABLE OF CONTENTS

	Page
Questions Presented.....	1
Listing of Parties.....	iii
Table of Contents and Table of Authorities.....	iv, v
Petition for a Writ of Certiorari....	1
References to Opinions Below.....	2
Jurisdiction.....	2
Constitutional Provisions.....	2
Statement of the Case.....	3
Reasons for Allowance of the Writ....	11
Conclusion.....	25

TABLE OF AUTHORITIES

	Page
Andreson v. Maryland, 427 U.S. 463 (1976)	18
Aquilar v. Texas, 378 U.S. 108 (1964)	12, 19
Franks v. Delaware, 438 U.S. 154 (1978)	i, 11, 12, 13, 14, 15, 16, 19, 21, 22, 23, 24, 25
Spinelli v. United States, 393 U.S. 410 (1969)	12, 20
United States v. Brinklow, 560 F.2d 1003 (10th Cir. 1977)	18

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment IV	2
U.S. Constitution, Amendment V	2

STATUTES

28 U.S.C. 1254(1)	2

Pet. No. _____

SUPREME COURT OF THE UNITED STATES

October Term 1982

JAMES M. PICCOLO, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, James M. Piccolo, respectfully prays that a writ of certiorari issue to review the judgment and opinion in the District of Columbia Court of Appeals for the District of Columbia on February 26, 1982 from the denial of a Hearing En Banc and the denial of a Petition for Rehearing entered on May 10, 1982.

REFERENCES TO OPINIONS BELOW

The Opinion in this case is in an unreported Opinion in the District of Columbia Court of Appeals rendered on February 26, 1982 which is attached hereto and made a part hereof (App. 1).

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on February 26, 1982.

A Petition for Rehearing or Hearing En Banc was timely filed and denied on May 10, 1982.

This Court's jurisdiction is invoked under Title 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The constitutional provisions are the Fourth and Fifth Amendments of the Constitution of the United States.

STATEMENT OF THE CASE

This case arose out of an indictment brought against James M. Piccolo in the Superior Court for the District of Columbia in Criminal No. F4047-78 in which the defendant, Piccolo was indicted on ten counts of receiving stolen property (App. 37). The police began an investigation of the defendant in August of 1977 for allegedly receiving stolen property from one Coyle G. Redman. The investigation had begun as a result of information supplied by one Dale Sutherland from whom the police officer, Sgt. Roger Johnson had never received any information prior to this incident nor did the Sgt. know of his reliability except as to his reliability as to others (App. 45). Sometime subsequent to the commencement of the investigation in August of 1977, after Sgt. Johnson had continued his investigation throughout the month of August, the Sgt. prepared an Affidavit in Support of a

Search Warrant, which his superiors refused to permit him to proceed on (App. 116-117). In the month of September, Sgt. Johnson had prepared a Memorandum to his superiors indicating that he had determined that his informant was unreliable (App. 121). At the trial of this cause in 1979, Sgt. Johnson testified that the reason he had declared Sutherland as unreliable was because Sutherland had continued doing business with Mr. Piccolo. (We parenthetically would like to state that the evidence in the record discloses that Sutherland had never personally done business with Mr. Piccolo but that he had accompanied Redman to the area of the store and had only gone in the store at one time as a messenger boy for Redman.) After September 1977 when Johnson had determined that his informant

was unreliable and that his superiors had refused to grant the issuance of a search warrant, he had terminated or suspended the invesgigation of Piccolo's alleged purchasing any additional stolen property. The investigation lay dormant until some time in April of 1978 at which time a Grand Jury was convened to hear another matter involving Redman/Sutherland and when the investigation now became viable. The investigation continued from April through August of 1978 at which time a Subpoena was issued from the Grand Jury to Mr. Piccolo directing him to bring his books and records to the Grand Jury.

One attempt was made to serve the Subpoena on August 10, 1978 and after such an attempt was made and that the Defendant was not present at his place of business on the date the attempt was made. The police Sgt. sought and procured a

search warrant from the Superior Court of the District of Columbia using the same Affidavit which he had prepared in 1977 in addition to the information furnished in his application for the search warrant (App. 117). As a result of the issuance of the search warrant, a complete and full execution of the search warrant, including seizure of documents and material not covered by the search warrant was conducted under the control of Sgt. Johnson, the police officer. The primary fruits of the search warrant were certain envelopes which indicated certain transactions, some of which were between Mr. Piccolo and Bo (Redman), some of which indicated that they were loans, others which indicated no name of Bo. A preliminary hearing was held on August 22, 1978 at which time the police officer testified that he had no

personal knowledge of the reliability of Dale Sutherland but others had found him reliable. (App. 45(a)).

The fact that Sgt. Johnson had found him unreliable by memo to his superiors was withheld. No mention was made until trial in June, 1979.

At the preliminary hearing the Defendant's counsel sought to ascertain why the search warrant was issued one year after the investigation had begun. The Court, upon objection of the government, refused to permit counsel to proceed. Thereafter, the defendant was indicted on November 14, 1978 by the Grand Jury on ten counts of knowingly receiving stolen property. Timely preliminary motions were filed by the Defendant's which motions were disposed of by the court on February 21 and 22, 1979. One of the Motions to Supress dealt with the staleness of the issuance of the

search warrant. (At this time, the defendant had no knowledge that the police Sgt. had found his informant to be unreliable, learning of this information only at the beginning of the trial when the Jencks material was supplied to counsel. The Court conducted no oral hearing concerning the Motion to Supress but merely found that probable cause had existed. The Defendant had asked for oral hearing to determine the validity of the search warrant, but for some reason the government opposed this hearing and the Court never permitted the Defendant to have an evidentiary hearing concerning the issuance of the search warrant by the Superior Court for the District of Columbia. Trial commenced in the Superior Court for the District of Columbia before the Honorable Leonard Braveman, Judge. The trial ended on June 20, 1979. During the trial when cross-examination of the police officers sought to illicit whether or not

certain information contained in the Statement of the lack of reliability of the informant, the Court stated on two separate occasions that it would not reopen the supression hearing. See transcript (App. 130 and 102). On June 20, 1978, the jury entered a verdict of guilty on counts 6, 8, 12 and 18 of the indictment finding the defendant not guilty of the other charges that remained open after the Court granted motions for acquittal on several of the other counts. A timely Motion for a new trial was filed on June 27, 1979 and on September 10, 1979, the Court denied the Motion and sentenced the defendant to a term of one to five years on each of the three felony count convictions to run concurrently and one year on the misdeanor conviction to be served concurrently with the other sentences.

On September 15, 1979, a timely Notice of Appeal was filed to the District of Columbia

Court of Appeals. On February 26, 1982, the Court of Appeals rendered a Memorandum Opinion and Judgment which is attached hereto as Appendix 1 affirming the convictions. A timely Motion for Hearing En Banc or Reconsideration was filed and denied on May 10, 1982. The Motions were denied. (App. 9).

REASONS FOR ALLOWANCE OF THE WRIT

This Petition for Certiorari rests on the denial by the lower Courts of Petitioner's substantial Fourth Amendment rights in a manner completely contradictory to the decision of this Court in the case of Franks v. Delaware, 438 U.S. 154 (1978).

In that case, this Court settled a matter of Fourth Amendment law that has received varying treatment in the Courts of Appeals; that is, the effect of misrepresentations of fact in an affidavit upon the validity of the search warrant issued pursuant thereto. The holding of this Court sets forth a rule allowing a defendant to challenge the truthfulness of factual statements, where such statements are necessary to the finding of probable cause. In addition, this Court provided that a hearing on this issue be held at defendant's request, once he has made a "substantial preliminary

showing" of both requirements. 438 U.S. at 155-6.

In this case, Petitioner challenges the sufficiency of the affidavit in support of the search warrant on the ground that it failed to set forth sufficient facts necessary to enable the Magistrate to independently assess the informant's reliability, as required under part two of the Aguilar-Spinelli rule (Aguilar v. Texas, 378 U.S. 108 (1964), Spinelli v. United States, 393 U.S. 410 (1969). Specifically, the affiant omitted the fact that he had found the informant to be unreliable; in fact, he affirmatively stated that he was reliable.

Parenthetically, it is of course, no answer to say that Johnson had subsequently found Sutherland to be reliable; if such facts and relied upon, they must certainly be

contained within the affidavit for the Magistrate's consideration.

In applying Franks, the court below held that Petitioner failed the second requirement of the rule. Since the Court concluded that probable cause existed even after discounting the misrepresentation (that is, the informant's reliability was thought to have been demonstrated elsewhere in the affidavit), no hearing on the affidavit's underlying factual basis was required. Alternatively, the court below ruled that Petitioner had failed to make a sufficient initial showing under Franks, and therefore, no hearing was required. App.

Petitioner asserts that to apply Franks to the facts of this case in the mechanical manner of the District of Columbia Court of Appeals produces a result completely at odds

with the spirit and underlying policy of Franks. Primarily, it is the nature of the misrepresentation - a direct contradiction, rather than the usual case of supplemental "facts" added to strengthen a weak affidavit - that makes the result reached below unjust and incorrect.

Three factual differences, and therefore three issues, are presently by this case. First, the application of Franks to a factual misrepresentation in the nature of an omission, where the remaining material is misleading to the Magistrate. Second, the effect of a direct contradiction in the fact of reliability on "residual" material in the affidavit that would, but for the finding of unreliability by the affiant, enable the Magistrate to infer probable cause. Third, the necessity of an initial showing by Petitioner where the affiant has admitted the misrepresentation on the witness

stand.

These issues correspond with the Franks requirements: (1) intentional or reckless misrepresentations, (2) that are material to probable cause, and (3) are demonstrated in a substantial initial showing, followed by a hearing in which because the circumstances make the simple application of Franks impossible, Petitioner suggests that this case presents an important question of federal law that has not been settled by this Court. Furthermore, the resolution of the case by the lower court is in conflict with the underlying principles of the Franks case. For these reasons, amplified below, the Writ should be granted.

1. Where the false statement is one directly contrary to the facts known to the affiant, or where the falsity is in the nature of omission, such that the affidavit gives the Magistrate a false impression of the underlying facts, such statements or omissions are intentional or at least reckless falsity for purposes of the Franks rule.

It is undisputed that the Affiant, Detective Sgt. Roger Johnson, misrepresented to the Magistrate the facts concerning the reliability of Dale Sutherland, the informant relied upon in the affidavit. Although stating that Sutherland was a "reliable confidential informant", it was later learned that Johnson found Sutherland to be, in fact, unreliable in September of 1977. Johnson withheld this fact from the Magistrate, and did not state facts in the affidavit showing why he again considered Sutherland reliable in August of 1978.

The mere presentation of the affidavit to the Magistrate was an intentional misrepresentation, or at the very least, a reckless

disregard for the truth, in that the Magistrate was misled by the selective nature of the information contained in the affidavit. All of the information was less than a year old; that is, all of the "facts" and events recited occurred before Detective Johnson's finding of unreliability. The officer's belief as to reliability, while not controlling, certainly is relevant where the belief is of unreliability, and the statement that Sutherland was considered reliable, without more, was an intentionally false and misleading statement.

Furthermore, although the question of the affidavit's staleness, an issue briefed and argued heavily below, is not directly involved here, it is an underlying issue in that the affiant's bold statement of reliability presented to the Magistrate on the date of the warrant's issue was itself over

a year stale. Notwithstanding the cases of Andreson v. Maryland, 427 U.S. 463 (1976) and U.S. v. Brinklow, 560 F.2d 1003 (10th Cir. 1977), Cert. denied, 434 U.S. 1047 (1977), the resulting affidavit was an intentional misrepresentation, designed to give the Magistrate the impression that the reliability information was current. At the least, it was reckless to fail to indicate to the Magistrate the age of the reliability information.

Johnson's omitting from the affidavit his finding Sutherland unreliable must, therefore, be considered an intentional, or at least reckless, falsity, since the resulting affidavit was misleading as a whole to the Magistrate charged with assessing probable cause. Of course, there has been no real challenge to this conclusion - that there was indeed a false statement - by the government or by the court below, and so it is clear that Petitioner meets the first part of the

Franks test.

What we urge as grounds for allowance of the writ, however, is the manner in which an officer can omit vital details (rather than supply additional ones), and succeed in evading not only the Franks dictates, but the staleness doctrine as well.

> 2. The application of part two of the Franks test, examining the remainder of the affidavit for probable cause, is not a workable application where the falsity is one of omission, and where the true facts known to the affiant contradict the mere inferences of the informant's reliability contained in the rest of the affidavit.

Certainly, without a showing of informant's reliability, the affidavit fails the second part of the Aquilar test, and would therefore lack probable cause. But after assuming that there was a false statement, the lower court found that under the Franks test, there remained "other indicia of reliability" in the aff .it after disre-

garding the falsity, therefore probable cause existed and no hearing was required. App.

The "indicia" cited in the opinion were, first, independent observations of the officers in verifying the informant's statements (see Spinelli v. United States, 393 U.S. 410 (1969), and second, the admissions of the informant against his penal interest. We concede that but for the finding of unreliability, these indicia would be sufficient to infer reliability and hence, probable cause. In this case, however, the false statement does not merely supplement the indicia, it directly contradicts them.

Neither of these indicia prove reliability; rather, they allow the Magistrate to merely infer reliability, in the absence of other facts negating reliability, for the purpose of deciding the probable cause issue. No inferential indicia can conclusively show reliability, and any such inference can be overcome by

contrary facts is the affiant-officer's own finding of unreliability.

This is the reason the Franks test of re-examining the remainder of the affidavit fails in this case. Ordinarily, false statements supporting a search warrant consist of additional observations, inferences, other indicia, and the like, and since such statements do not affect other facts contained within the affidavit, those remianing facts may be re-examined under Franks for probable cause despite the misrepresentations and after exising them. But where, as in this case, the falsity directly contradicts the inference (of reliability) drawn from the remainder, those "other indicia" cannot save the affidavit.

In other words, where the officer-affiant has personally found an informant unreliable, it is absurd to blindly con-

clude that because there exist indicia that infer the contrary conclusion, the informant must be reliable.

As an alternative analysis, the falsity can be considered one of omission, and the Franks test fails again because it is impossible to excise an omission in order to re-examine for probable cause.

This case, therefore, presents an issue undecided by this Court, but in need of resolution, since under the facts of this case, the application of a decision of this Court leads to a result contrary to the principles of that decision.

> 3. The "substantial initial showing" required by Franks v. Delaware is satisfied, at least as to the issue of the existence of intentional or reckless falsity, where the officer-affiant admits that he misstated facts, or omitted material facts such that the affidavit was misleading viewed as a whole.

One of the main allegations of error presented to the lower court was the failure to allow any sort of hearing whatsoever on the issue of the underlying factual basis of the affidavit. Consideration of the issue was refused at the preliminary hearing, it was incomplete at the suppression hearing (since counsel for Petitioner was unaware of the false statements), and, even after discovered by counsel at trial, the court three times admonished counsel not to inquire into the issue, and further stated catagorically that the court would not reopen the suppression hearing to permit such inquiry. App. 130 and 102.

The issue presented, therefore, goes to the viability, in a realistic sense, of the Franks rule. Counsel is unlikely to

learn of any falsity in advance of trial (barring prosecutorial generosity), and is therefore caught in the "Catch-22" of being required to make a substantial initial showing of the falsity in order to get a hearing, but needing a hearing to make that initial showing itself. All counsel can do is proffer his knowledge to the court, a method deemed insufficient under Franks.

Certainly the reasons for requiring a particularized showing are strong, as stated in Franks, 438 U.S. 165-167, 171. And the need for the procedural limitations imposed by Franks is clear in situations where counsel for the defendant obtains information from outside sources. But where, as here, the government and its police officers admit the falsity, the need for such safeguards is greatly reduced, to the extent that such an admission by the

government should be sufficient to meet the first test in Franks.

In order to avoid the loss of a defendant's rights under Franks in egregious cases, where it is needed most, this Court should resolve the important issue of sufficiency of the Franks showing where the government has admitted to falsity in the affidavit.

CONCLUSION

The peculiar facts of this case - the nature of the false statements and omissions, as well as their admission by the government - call for a re-examination by this Court of the Franks requirements. This case presents issues undecided by this Court, but which need resolution; otherwise, this and similar cases will be

resolved in a manner totally in conflict with the applicable decisions of this Court.

This Writ should be allowed.

Respectfully submitted,

Benjamin B. Brown
11300 Rockville Pike
Suite Twelve North
Rockville, Maryland 20852
(301) 770-3020
Counsel for Petitioner